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UNITED STATES OF AMERICA

9 UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 ROSARIO HERNANDEZ MAGCALAS,

15 Defendant.

No. CR 18-407-FMO

GOVERNMENT'S RESPONSE TO
PRE-SENTENCE REPORT AND POSITION
RE: SENTENCING FOR DEFENDANT
ROSARIO HERNANDEZ MAGCALAS

Hearing Date: September 12, 2019
Hearing Time: 3:00 p.m.

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18 Plaintiff United States of America, by and through its counsel
19 of record, the United States Attorney for the Central District of
20 California and Assistant United States Attorney Brett A. Sagel,
21 hereby files its response to the Pre-Sentence Report and its position
22 regarding sentencing for defendant ROSARIO HERNANDEZ MAGCALAS.

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1 The Government's response to the Pre-Sentence Report and its
2 position regarding sentencing is based upon the attached memorandum
3 of points and authorities, the files and records in this case, and
4 such further evidence and argument as the Court may permit.

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6 Dated: August 26, 2019

Respectfully submitted,

7 NICOLA T. HANNA
8 United States Attorney

9 BRANDON D. FOX
10 Assistant United States Attorney
11 Chief, Criminal Division

12 /s/
13 _____
14 BRETT A. SAGEL
15 Assistant United States Attorney

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17 Attorneys for Plaintiff
18 UNITED STATES OF AMERICA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 27, 2018, the grand jury indicted defendant ROSARIO HERNANDEZ MAGCALAS ("defendant") on three counts of wire fraud, in violation of 18 U.S.C. § 1343, for her scheme to defraud her former employer, Image 2000. On February 7, 2019, defendant pled guilty, without a plea agreement, to count three of the three-count indictment. The United States Probation Office ("USPO") disclosed its Presentence Report ("PSR") to the parties on August 1, 2019. The USPO determined defendant's total offense level to be 20 and to have a criminal history category I, resulting in an advisory range of imprisonment of 33-41 months. The USPO recommends that defendant receive a sentence of 33 months' imprisonment, pay \$3,317,923.89 in restitution, and be placed on supervised release for a term of two years.¹

The Government has no objections to the factual statements in the PSR, the sentencing guideline calculation, or the calculation of criminal history category. The Government believes the USPO properly captured the offense conduct and analyzed the particular Section 3553 factors, and the Government concurs with the recommendation of the USPO, except the Government believes defendant's term of supervised release should be three years. For the reasons set forth below, the

¹ Defendant entered her guilty plea on February 7, 2019. Defendant requested the sentencing hearing to be set for July 18, 2019, a longer-than-usual period for a sentencing hearing for defendant to put together financial information for sentencing. Defendant sought and received a continuance of defendant's sentencing hearing on May 22, 2019, again for defendant to provide financial information to the USPO for sentencing. According to the USPO, as of August 25, 2019, defendant still has provided no financial information to the USPO.

1 Government believes that the advisory sentencing guidelines
2 appropriately considers the criminal conduct and this Court should
3 sentence defendant to 33 months' imprisonment and order defendant to
4 pay \$3,317,923.89 in restitution to Image 2000. Due to the large
5 restitution amount defendant will owe, the Government believes
6 defendant's term of supervised release should be three years for the
7 USPO to oversee any funds that could be used to pay restitution.

8 **II. FACTUAL BACKGROUND**

9 The PSR sets forth the facts to which defendant admitted at
10 defendant's change of plea hearing:

11 Defendant worked in the Accounts Payable department of Image
12 2000, Inc. ("Image 2000") and was responsible for, among other
13 things, creating checks from Image 2000's checking account to pay
14 invoices from vendors of Image 2000 and having either R.C. or J.B.,
15 the owners of Image 2000, sign the checks. Defendant held personal
16 bank accounts at Bank of America, Chase Bank, and Wells Fargo Bank.
17 Image 2000 held business bank accounts at California Bank and Trust
18 and First Republic Bank.

19 Beginning on an unknown date, but at least as early as in or
20 about January 2011, and continuing until in or about August 2017, in
21 Orange and Los Angeles Counties, within the Central District of
22 California, and elsewhere, defendant, knowingly and with intent to
23 defraud, devised, participated in, and executed a scheme to defraud
24 Image 2000 as to material matters, and to obtain money and property
25 from Image 2000 by means of material false and fraudulent pretenses,
26 representations, and promises. In carrying out the fraudulent
27 scheme, acting with intent to defraud and deceive, defendant
28 knowingly caused false information and false statements to be

1 communicated, and engaged in fraudulent and deceptive acts,
2 practices, and devices, including without limitations, the following:
3 defendant would create fraudulent invoices from legitimate vendors of
4 Image 2000; defendant would prepare checks in the amount of the
5 fraudulent invoices payable to Image 2000's legitimate vendors from
6 Image 2000's business bank accounts; defendant would present the
7 checks and the fraudulent invoices that purportedly supported the
8 checks to R.C. or J.B. for their signature on the checks; and
9 defendant would deposit the checks into her personal bank accounts
10 using ATM machines.

11 On or about May 2, 2017, within the Central District of
12 California and elsewhere, for the purpose of executing the scheme to
13 defraud, defendant deposited into her Chase Bank account at an ATM,
14 check number 7664 issued from the "Image 2000 Orange County Account"
15 held at California Bank and Trust, made payable to "Sharp Business
16 Systems," in the amount of \$1,376.35, which resulted in the
17 electronic settlement of funds between the banks to occur in multiple
18 states and caused the transmission of a wire communication in
19 interstate commerce. (PSR ¶¶ 6-8.)

20 Defendant pleaded guilty without a plea agreement and did not
21 admit to the amount of loss she caused Image 2000. The PSR states:
22 "In total, Image 2000 suffered an actual loss of \$3,317,923.89 as a
23 result of Magcalas' conduct." (PSR ¶ 8.) This is correct with one
24 caveat: The factual basis for the plea and the bank records start in
25 January 2011 because that was as far back as the banks had records.
26 The bank records show defendant was already embezzling money from her
27 employer in January 2011. As such, it is likely that defendant's
28 criminal conduct started before January 2011 and caused an even

greater loss to Image 2000. For sentencing purposes, however, the bank records establish a loss of \$3,317,923.89 caused by defendant's criminal conduct.

III. SENTENCING RECOMMENDATION

A. The Government's Guideline Calculation

The Government submits that the following guideline calculation applies in the sentencing of defendant:

Base Offense Level:	7	U.S.S.G. § 2B1.1(a)(1)
Loss between \$1.5M-\$3.5M:	+16	U.S.S.G. § 2B1.1(b)(1)(I)
Acceptance of Responsibility:	-3	U.S.S.G. § 3E1.1

Total Offense Level: 20

A total offense level of twenty and a criminal history category I, yields an advisory sentencing range of 33-41 months' imprisonment.

B. The Government's Recommended Sentence

The law provides that sentencing courts must start with the sentence advised by the Sentencing Guidelines. United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."); United States v. Cantrell, 433 F.3d 1269, 1279 (9th Cir. 2006) (stressing that "district courts still must consult the Guidelines and take them into account when sentencing, even though they now have the discretion to impose non-Guidelines sentences"). Pursuant to 18 U.S.C. § 3553(a), the court should "impose a sentence sufficient, but not greater than necessary," to comply with the enumerated purposes of sentencing, including:

1 (1) the nature and circumstances of the offense and the
2 history and characteristics of the defendant; (2) the need
for the sentence imposed--

3 (A) to reflect the seriousness of the offense, to
4 promote respect for the law, and to provide just
5 punishment for the offense; (B) to afford adequate
6 deterrence to criminal conduct; (C) to protect the
public from further crimes of the defendant; and (D)
to provide the defendant with needed educational or
vocational training, medical care, or other
correctional treatment in the most effective manner[.]

7 18 U.S.C. § 3553(a)(1), (2).

8 The Government agrees with the USPO that after considering all
9 of the Section 3553 factors, that a within guideline sentence of
10 thirty-three months is appropriate.

11 1. Nature and Circumstances of the Offense

12 Defendant engaged in her fraudulent scheme for at least six and
13 a half years, and likely longer, writing and depositing over 3,000
14 fraudulent checks, and caused actual losses of over \$3.3 million to
15 her employer. The money defendant embezzled from her employer
16 obviously had a deleterious impact on the company and its owners, and
17 potentially could have been used, among other things, to pay other
18 employees, hire additional employees, and expand the business.
19 Moreover, the loss defendant caused is at the high-end of the \$1.5
20 million to \$3.5 million range, providing further aggravation to
21 defendant's criminal conduct. Although the Government does not
22 believe the facts in this case justify a two-level increase for abuse
23 of position of trust or use of a special skill, particularly in light
24 of the application notes to Section 3B1.3 ("professional or
25 managerial discretion" and "substantial education, training or
26 licensing"), this Court should note, in aggravation, that defendant
27 definitely abused the trust of her employer and used her special
28 knowledge of how the accounts payable department operated to carry

1 out her fraudulent scheme. The numerous years, countless fraudulent
2 checks, and millions of dollars of loss that defendant caused
3 justifies a within-guidelines sentence.²

4 2. History and Characteristics of Defendant

5 Although defendant's criminal history category is I, this is
6 defendant's second felony conviction for a fraud-related offense.
7 The Government appreciates that defendant's prior conviction was in
8 1991, but the prior conviction and the length of defendant's
9 fraudulent scheme in this case portray a defendant quite different
10 from the typical defendant with a criminal history category I.

11 3. Deterrence, Promoting Respect for the Law, Protecting

12 The Public from Defendant, and Punishing Defendant.

13 Deterrence, both general and specific, is a particularly
14 important factor here. Specifically, defendant engaged in her
15 criminal conduct for well over six years, stealing over \$3.3 million,
16 and to this date has yet to fully admit to her conduct. A within
17 guideline sentence is necessary to deter others from engaging in
18 similar conduct as defendant, to deter defendant from committing any
19 further offenses, and to punish defendant for her crimes and protect
20 the public from defendant.

21 IV. CONCLUSION

22 The Government recommends this Court sentence defendant to: 33
23 months' imprisonment; pay \$3,317,923.89 in restitution, and be placed
24 on supervised release for a term of three years under the conditions
25 set forth by the USPO. The Government believes this sentence is

26 ² The Government has been told that one or both of the owners of
27 Image 2000, the victim, wish to be heard at sentencing. If they
28 provide an victim-impact statement in advance, the Government will
provide that to the Court as well.

1 reasonable and appropriate, and is sufficient, but not greater than
2 necessary, to achieve the goals of 18 U.S.C. § 3553(a).